85-2076

Supreme Court, U.S.
FILED
APR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1985

BERNARDO RODRIGUEZ,

Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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16pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Fourth Amendment mandates the suppression of evidence found, during a search pursuant to an arrest warrant, in an area to which the searching authorities had no reasonable belief the suspect had access?

II.

Whether there is a violation of 18 U.S.C. Section 922(a)(6), which prohibits knowingly making a false statement in the purchase of a firearm, when the purchaser had a reasonable belief in the truthfulness of his statement and had no intent to deceive?

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OPINION BELOW

As to the Fourth Amendment issue, the District Court's oral findings of fact and ruling are set forth in the Appendix to this Petition.

The Eleventh Circuit Court of Appeals affirmed a judgment of the United States District Court for the Southern District of Florida finding petitioner guilty of making false statements in violation of 18 U.S.C. Section 922(a)(6) in an unpublished opinion which reads in full:

PER CURIAM: AFFIRMED. See Cir. R. 25.

Rehearing of this judgment was denied per curiam. See Appendix.

JURISDICTIONAL STATEMENT

On January 8, 1986, the Eleventh Circuit Court of Appeals affirmed petitioner's convictions of firearms violations. Rehearing of that decision was denied on February 20, 1986.

This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C.A. Section 1254(1) (1966).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Petitioner's first question for review involves the Fourth Amendment, which in pertinent part provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. . . .

U.S. Const. Amend. IV.

The second issue presented involves 18 U.S.C. Section 922(a)(6), which provides:

> (a) It shall be unlawful-
> (6) for any person in connection with the acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

18 U.S.C.A. Section 922(a)(6) (1976).

STATEMENT OF THE CASE

On January 30, 1984, a warrant for the arrest of petitioner was issued upon a complaint charging him with a violation of U.S.C. Section 922(a)(6). Consequently, on February 4, 1984, Special Agent Dennis Hamburger of the United States Bureau of Alcohol, Tobacco and Firearms went to an address believed to be that of petitioner in an attempt to serve the arrest warrant.

Upon approaching the front of the subject premises, Agent Hamburger recognized a known fugitive who was then exiting the front gate. Agent Hamburger proceeded to arrest the fugitive, who informed him that petitioner was inside the premises. Therefore, while remaining outside the front of the premises, the front and side of which remained in full view, Agent Hamburger called for backup assistance. When additional agents arrived, a search was conducted of the premises, although petitioner was not found within.

Petitioner moved to suppress certain firearms which were found within an exterior attic crawl space of the premises. At a hearing on the motion to suppress, the uncontroverted testimony of the agents who seized the firearms established that the firearms were found in an area which, according to their belief as to petitioner's location, he could not have entered without their seeing him. Specifically, the testimony established that the agents were told that petitioner was inside the premises, which was under continual surveillance of the front and side from the time the first agent arrived until the end of the search. Yet, the officers saw fit to search an attic crawl space on the side of the premises which

they had determined could only be entered from the outside of the premises.

Thus, the evidence established that the area in which the weapons were found could not have been entered by petitioner without his being seen by the surveilling officers.

Additionally, testimony established that the description of petitioner which had been circulated to law enforcement officers stated that petitioner was five feet, nine inches tall and weighed 200 pounds. The entrance to the crawl space was fourteen inches wide and seventeen and one-half inches high, and located approximately ten to twelve feet from the ground. Thus, the only possible means of access other than by ladder was by climbing up to and then standing on a flimsy two-inch conduit pipe running four or five feet below the crawl space, and from that position pulling himself vertically up the side of the house and through the entrance to the crawl space. The agents failed to explain how they believed a stocky, 200 pound man could have accomplished this in full view of the surveillance teams and yet not be noticed.

Petitioner argued in his motion to suppress that the searching officers could therefore not have reasonably or even subjectively believed that petitioner was hiding in the attic crawl space, and therefore a search warrant should and could have been obtained prior to any search of this area. Nonetheless, the District Court refused to suppress the firearms found in the crawl space.

Petitioner was tried for, *inter alia*, knowingly making false statements in obtaining firearms by representing that he was not a convicted felon. Testimony at trial established that petitioner's attorney during an earlier, state court criminal proceeding had advised petitioner that by accepting a negotiated plea, petitioner could say he was not a convicted felon. The attorney further testified that he believed the state judge had told petitioner he could always say he had never been convicted. The government presented no evidence that petitioner did not, therefore, honestly believe he was not a convicted felon.[1]

Because of this honest belief in the truth of his statement, petitioner sought acquittal of the Section 922(a)(6) charges, arguing that he did not "knowingly" make a false statement and did not have the requisite intent to deceive. This issue was, however, sent to the jury, and petitioner was found guilty of knowingly making a false statement.

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[1]Petitioner concedes, *arguendo*, that he was in fact a convicted felon for purposes of firearms disabilities under this Court's holding in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983).

STATEMENT OF FEDERAL JURISDICTION OF THE DISTRICT COURT

The District Court had jurisdiction over this case pursuant to 18 U.S.C.A. Section 3231 (1985).

ARGUMENT

The weapons seized in the exterior attic crawl space should have been suppressed.

This issue raises the question of the permissible scope of a search pursuant to an *arrest* warrant. The general principle is well established that a search for an individual pursuant to an arrest warrant may be only:

> as broad as may reasonably be necessary to prevent the dangers that the suspect at large may resist or escape.

Warden v. Hayden, 387 U.S. 294, 299, 87 S.Ct. 1642, 1646, 18 L.Ed.2d 782, 787 (1967). Thus, in that case this Court pragmatically held that since a suspect was at large in a house, it was reasonable for a police officer to search for weapons in a washing machine in that house since the at-large suspect could conceivably have retrieved a weapon from the machine and used it to resist arrest. *See id.* at 299-300 and n.5, 87 S.Ct. at 1646 and n.5, 18 L.Ed.2d at 788 and n.5.

Here, however, there was no such element of reasonableness for the search. The very premise of the Fourth Amendment was disregarded. As reviewed in the statement of the case, *supra* this Petition, the facts

surrounding the search of the attic crawl space were such that the agents could not have reasonably believed it necessary to conduct that search within the limits set forth in *Warden v. Hayden.* To suggest that petitioner might have climbed onto a two-inch pipe, from there dragged himself four or five feet up the exterior of a building, and then pulled his hefty body through a tiny aperture—all the while unseen by the continuously-surveilling officers—is to suggest the absurd.

The search of the attic crawl space was constitutionally infirm; a warrant to search should have been obtained. Petitioner thus urges that a writ of certiorari issue to review the Eleventh Circuit's order affirming his conviction on the charges resulting from the seizure of firearms from that area.

18 U.S.C. Section 922(a)(6) is a section of the comprehensive firearms control provisions of the United States Code disabling certain individuals from obtaining weapons. Some firearms control sections create strict liability crimes requiring no mental culpability for violation. *See United States v. Freed*, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971). Section 922(a)(6) specifically provides, however, that in order for culpability to attach under its provisions, the accused must have "knowingly" made a false statement which is "intended or likely to deceive" a firearms dealer. Despite this clear language, however, petitioner was convicted of violating Section 922(a)(6) although he believed he was not a convicted felon. This result places the Eleventh Circuit's position as to the requisite knowledge squarely in conflict with at least five other federal circuit courts

of appeals, as well as with the former Fifth Circuit.[2] Certiorari should, therefore, be granted in order to resolve this conflict. *See United States v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963).

Specific intent to violate the law is not an element to be proven to establish a violation of Section 922(a)(6). *E.g., United States v. Cornett*, 484 F.2d 1365, 1368 (6th Cir. 1973); *United States v. Beebe*, 467 F.2d 222, 226 (10th Cir. 1972), *cert. denied*, 416 U.S. 904, 94 S.Ct. 1607, 40 L.Ed.2d 108 (1974). Thus, ignorance of the law is no defense to a charge of violating section 922(a)(6). *See, e.g., United States v. Squires*, 440 F.2d 859 (2d Cir. 1971).

Ignorance of the *facts*, however, constitutes a defense to violating this section, as the majority of federal circuits have held knowledge that the facts asserted are false plus an intent to deceive to be elements of proof of Section 922(a)(6). *United States v. Schmitt*, 748 F.2d 249, 253 (5th Cir. 1984); *United States v. Cochran*, 546 F.2d 27, 29 (5th Cir. 1977); *United States v. Behenna*, 552 F.2d 573, 575 (4th Cir. 1977); *Cody v. United States*, 460 F.2d 34, 38 (8th Cir.), *cert. denied*, 409 U.S. 1010, 93 S.Ct. 454, 34 L.Ed.2d 303 (1972) ("crucial question" is accused's understanding "of the facts, not the law"); *United States v. Beebe, supra*, 467 F.2d at 226 (10th Cir.); *United States v. Squires, supra*, 440 F.2d at 864 (2d Cir.); *see United States v. Renner*, 496 F.2d 922 (6th Cir. 1974).

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[2]The Eleventh Circuit has adopted as controlling precedent the decisions of the former Fifth Circuit prior to October 1, 1981. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981).

In this case, petitioner has been convicted despite his ignorance of the facts: he had no knowledge that he was making a false statement, and certainly, therefore, no intent to deceive. The grant of this Petition for Certiorari will enable this Court to review this resulting disparity between the law in the Eleventh Circuit and that of nearly every other appellate circuit.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

BARBAKOFF, FLEITMAN &
SCHWARTZ, P.A.
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9100 SOUTH DADELAND BLVD.
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(305) 666-0010

BY: _____
FRED A. SCHWARTZ, ESQ.

BY: _____
PETER S. FLEITMAN, ESQ.

CERTIFICATE OF SERVICE

I HEREBY certify that a true copy of this Petition was mailed to the United States Attorney for the Southern District of Florida, 155 South Miami Avenue, Miami, Florida 33156, and that 3 true copies were mailed to the United States Solicitor General, Department of Justice, Room 5614, Washington, D.C. 20530, this 7th day of May 1986.

BY: _____

85-2076

Supreme Court, U.S.
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OCTOBER TERM, 1985

BERNARDO RODRIGUEZ,

Petitioner

vs.

UNITED STATES OF AMERICA

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETER S. FLEITMAN, ESQ.
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Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
FLORIDA MIAMI DIVISION

CASE NO. 84-132-Cr-SMA

UNITED STATES OF AMERICA
Plaintiff,

vs.

BERNARDO RODRIGUEZ,
Defendant

U.S. District Courthouse
Miami,Florida
Thursday, 9:31 a.m.
July 12, 1984

The above-entitled cause came on for Hearing on Motions before The Honorable SIDNEY M. ARONOVITZ, United States District Judge, pursuant to notice.

APPEARANCES:
(As herein announced.)

VOLUME 1

[EXCERPT PAGES 1-129 THROUGH 1-136]

THE COURT: This Court has considered the defendant's motion to suppress a photographic exhibit. No testimony was taken thereof because the defendant, prior to commencement of testimony, withdrew that motion.

The Court further then considered the matter of the defendant's motion to suppress the physical evidence seized at the premises at 778 Northwest 108th Street, Miami, Florida.

It appears to this Court, and the facts show, and the Court makes the following findings of fact and conclusions of law, which can be reduced to written form, if necessary:

On February 4, 1984, Special Agent of the ATF, Dennis Hamburger, approached the premises at 778 Northwest 108th Street, Miami, in unincorporated Dade County.

He went there for the purpose of

trying to ascertain whether he could serve an arrest warrant upon one Bernardo Rodriguez, the defendant in this case, which warrant had been issued by the United States Magistrate for an indictment previously returned against that defendant.

When he approached the premises, and while driving by, this special agent recognized an accomplice by the name of Payret, who was exiting the front gate of the premises, and who appeared on the same flyer which had been published to cause the arrest and seizure of this defendant.

The officer then prudently approached and arrested Payret on the warrant from Texas that was then outstanding, and after handcuffing him, learned upon inquiry that the Defendant Bernardo Rodriguez was inside the premises.

He also discovered that a young child in the front of the house, the front of the premises, was identified by Payret as Defendant Rodriguez' son.

He noted that the front door of the premises was open, and accordingly, he called for backup assistance to execute the arrest warrant on Bernardo Rodriguez.

Under all of the circumstances that were then present at the time and as known to Officer Hamburger, this Court finds that he had not only reasonable suspicion, but he had probable cause to believe that Bernardo Rodriguez was then within the subject premises.

When backup help arrived from the ATF and from Metropolitan Dade County Police, that was followed by the special response team of Metropolitan Dade County, Florida, ultimately and within thirty minutes of the first approach to

the house, at about 2:30 p.m., the premises had been surrounded and occupants of nearby homes had been evacuated in anticipation of the entry that might be necessary by reason of the loud speaker hailing by the ATF agents, which were for naught and for which the defendant did not respond.

There was a period of about a half an hour, from about 2:00 p.m. until 2:30, when the entire premises were not surrounded and during which time someone could have left the premises. The backup or special response team, did not arrive until about 4:00 p.m.

When it did so, the backup team prudently undertook, in a very highly professional manner, to make an entry solely and wholly for the purpose of serving the arrest warrant upon Bernardo Rodriguez, who was believed to be, with probable cause, within the subject

premises.

The initial entry was gained by the team. That team in accordance with standard operating procedure, made two sweeps of the premises; one the primary and the other secondary, designed to ascertain whether the subject was on the premises and to provide security against other people armed or otherwise being on the premises and constituting a possible danger to the entering officers.

In the course of those sweeps, and in plain view, several weapons were seen within the bedroom and in a closet and elsewhere within the premises.

Other items were seen. None of them were touched.

Thereupon, not finding the defendant within the premises, the officers continued their primary and secondary search by raising a ladder to the exterior of the wall of the house,

which had a metallic outlet covering a crawl space or attic area entryway.

The officers testified that the metallic grate was pushed in at the top, suggesting that it had been opened, or someone had pushed it into place, and they had, therefore, further reason and grounds to believe that someone may have been in the area involved.

Now, the Court accepts the testimony of the police officer who made the actual entry into crawl space, and that was Detective Steven Ellison of the Metro Police Special Team, that he made his entry and that he actually got into the craw space. I have no reason to doubt it. I have no reason to dispute it.

He has accurately described what was inside and in great detail has set forth the dimensions of the space within the crawl area, and there is no reason

to believe or to hold other than that the entry was for the purpose of ascertaining whether or not the defendant, or any other possible security risk, was hidden in that crawl space area, and at all times it is important to note that security is paramount in the very dangerous and delicate entries that are made by these special teams, particularly, and without adequate effort to protect against unknown and unexpected hazards, the risk is increased, obviously, substantially.

There is no reason why the Court, in this instance, should attempt to assert its judgment that the area in question at the time the search was made did not necessarily suggest or pose a circumstance in which someone, the defendant or some other person, could not have been hidden in it.

I do not think that the officers

who responded, under those circumstances, have to be bound by or restricted unduly in terms of that which is necessary in the performance of their duties, particularly where security risks are involved.

I'm simply saying that here, and under these circumstances, the entry was proper for the purposes, the intention, the intended purpose, the standard operating procedure that was exercised not only here but in other entries by this same team.

Now, thereafter, a search warrant was obtained. This search warrant, which is Defendant's Exhibit 6, is relevant here not as addressed to any of the weapons found within the interior of the premises in plain view, but as to those other items of evidence, if any, that were seized as a result of the search founded on the search warrant,

including some two-way radios and things like that.

Now, the Court finds that the affidavit for the search warrant is lawful, meets the requirements of law and is adequate, including its description of the residence to be searched.

In terms of a residence 778 Northwest 108th Street, Miami, Florida, the main house, which was the subject of the search, is the residence located at that address.

The other smaller building to the right is a converted garage into what appears to be intended for an apartment purpose, but not as a primary building on the premises.

The description used in the affidavit, and as appears in the search warrant, is adequate to sustain the search, therefore, that was made of the

primary premises, which, incidentally, also, apparently are the part of the premises appearing on the gate identified at 778 Northwest 108th Street.

With regard to the items, therefore, seized as a result of that search, other than the firearms within the interior of the house, I find that the search was lawful and made pursuant to and under a search warrant authorized by law.

I also find that with regard to the matter of the weapons that were removed from the crawl space or attic area, they were removed prior to the time that the search warrant was issued or obtained, and the Government is not contending or making any argument that they were properly seized on the basis of the search warrant.

I find that these items were in

plain view when the officer and other officers looked into the crawl space; that they constituted obvious contraband in the description of the guns and the description of the leafy substance, as well as the powder substance and, therefore, that the seizure was made of these items found in plain view.

Accordingly, the motion to suppress is denied as to all of the grounds and all of the evidence, and the same can be admitted.

I take note of the Government's reference to Payton versus New York, as well as the Spencer case and other cases cited in the Government's memorandum as being applicable here.

I do not feel that under the circumstances involved in this case, the mere fact that the entry to the crawl space or the attic space was exterior and not interior is sufficient to take

it outside the scope of a legally authorized search under the circumstances that prevailed here.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
FLORIDA

Docket No.: 84-132-Cr-SMA

United States vs.
Bernardo Rodriguez

JUDGMENT AND PROBATION/COMMITMENT ORDER

[EXCERPT]
***

There being a verdict of Guilty

Defendant has been convicted as charged of the offense(s) in violation of Title 18 USC, Section 922 (a)(6) & 924 (a), as to Cts: 1 and 2; Title 18, USC, Sections 922 (h)(1) & 924(a), as to Cts 3 and 4; Title 26 USC, Section 5861(d) & 5871, as To Cts. 5 and 6, Title 26, USC, 5861(1) & 5871, as to Cts. 7; Title 18 USC, (appendix 1) Section 1202(a) (1) as to Cts. 8,9,10,11,12,and 13.

***

The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS as to each of Counts 1, 2, 3, 4, said sentences are to run concurrently with each other.

ORDERED AND ADJUDGED that the Defendants shall serve a sentence of confinement of TWO (2) YEARS as to each of Counts 5, 6, 7 said sentences are to run concurrently with each other.. but consecutively to sentence imposed in Counts 1, 2, 3, 4.

ORDERED AND ADJUDGED that imposition of sentence of confinement shall be withheld and the Defendant be placed on probation as to each of Counts 9, 10, 11, 12, 13 for a period of FIVE (5) YEARS, said sentence shall run concurrently with each other and shall be served following period of

confinement. Sentence of probation shall be served under the Standing Conditions of Probation as defined by the Court's Order entered August 1, 1964.

***

/S/
SIDNEY M. ARONOVITZ
Date: August 22, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 84-5765
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BERNARDO RODRIGUEZ,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(January 8, 1986)

Before FAY, JOHNSON and CLARK, Circuit Court Judges.

PER CURIAM: AFFIRMED. See Cir. R. 25.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5765

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BERNARDO RODRIGUEZ,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING
(February 20, 1986)

BEFORE: FAY, JOHNSON and CLARK

PER CURIAM

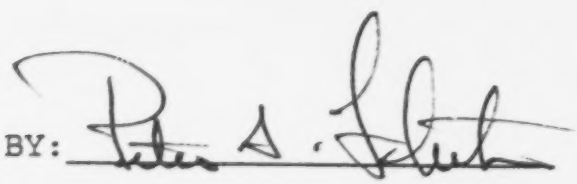
The petition(s) for rehearing filed by appellant is denied.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Appendix was mailed to the United States Attorney for the Southern District of Florida, 155 South Miami Avenue, Miami, Florida 33156, and that 3 true copies were mailed to the United States Solicitor General, Department of Justice, Room 5614, Washington, D.C. 20530, this 7 day of May, 1986.

BY: 

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OCTOBER TERM, 1986

BERNARDO RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that law enforcement officers acted unreasonably in executing an arrest warrant, and that the government failed to establish his guilt at trial.

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on 13 counts relating to the unlawful possession and acquisition of firearms. He was sentenced to a total of five years' imprisonment, to be followed by five years' probation.

The evidence at trial established that in September 1983 petitioner pleaded nolo contendere in Florida state court to one count of possession of a controlled substance and to three counts of carrying a concealed firearm, crimes that were punishable by a term of imprisonment in excess of one year. Adjudication was withheld and appellant was placed

on one year's probation. The terms of petitioner's probation included an absolute prohibition on the possession of weapons or firearms. 3 R. 39-40, 53.*

Shortly afterwards, on October 6, 1983, and November 29, 1983, petitioner purchased firearms from federally-licensed firearms dealers. Prior to each of those transactions, petitioner completed a federal firearms form, in each case answering in the negative the following question:

> Have you ever been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: the actual sentence given by the judge does not matter—a yes answer is necessary if the judge could have given a sentence of more than one year. Also a "yes" answer is required if a conviction has been discharged, set aside or dismissed, pursuant to an expungement or rehabilitation statute * * * .)

3 R. 61, 64-65, 70-71, 74-75.

2. On January 30, 1984, petitioner was charged with making a false statement in connection with the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6). A warrant was issued for his arrest. On February 4, 1984, an agent of the Bureau of Alcohol, Tobacco and Firearms went to petitioner's residence to execute the warrant. As he approached the house, the agent recognized another fugitive, Moises Payret, coming out the front door. The agent arrested Payret, who said that petitioner was inside the house and that a young boy standing in the yard was petitioner's son. Pet. App. 2-4.

The agent then called for backup assistance. Additional law enforcement officers arrived shortly thereafter; they surrounded the house some 30 minutes after the call for

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*"R." indicates the record on appeal.

assistance had been made. Pet. App. 4-5. After repeated attempts to communicate with petitioner by means of a bullhorn were unsuccessful, the officers entered the home to execute the warrant. When they did not find petitioner inside, the officers placed a ladder against the exterior wall of the house to inspect the attic. They found that a grating covering the exterior entrance to the attic crawl space had been pushed in. A detective accordingly crawled inside the attic and discovered guns, marijuana, and a white powder. Pet. App. 11-12. Petitioner himself was not in the house, however. He was arrested approximately two weeks later.

Following a hearing, the district court denied petitioner's motion to suppress the evidence that was seized from the attic of his residence. The district court found that the ATF agent had probable cause to believe that petitioner was on the premises when he called for backup help (Pet. App. 4). The court also found that the officers acted reasonably in entering the attic crawl space to determine whether petitioner, or others posing security risks, had hidden inside (*id.* at 8). The district court therefore held that the officers' seizure of the items they found in the crawl space was lawful (*id.* at 12). The court of appeals affirmed petitioner's conviction without opinion (*id.* at 17).

3. Before this Court, petitioner repeats his challenge to the search of his attic. He primarily contends (Pet. 6-7) that the agents "could not have reasonably believed it necessary" to search the attic, asserting that he could not have climbed into the crawl space without being seen by the "continuously surveilling officers." The facts found by the district court, however, do not support this contention. The court specifically found (Pet. App. 5) that the house had not been surrounded by law enforcement officers for a period of 30 minutes after the first agent's arrival, so that petitioner had an opportunity to enter the attic surreptitiously. The court also accepted testimony that the metallic grate at the

entrance to the attic crawl space had been pushed in, giving officers reasonable cause to believe that someone had entered the crawl space. In these circumstances, there is little doubt that the officers acted properly in entering the attic in an attempt to execute the arrest warrant. See *Payton* v. *New York*, 445 U.S. 573 (1980); *Warden* v. *Hayden*, 387 U.S. 294, 299 (1967).

Petitioner's next contention—that he should not have been convicted of violating 18 U.S.C. 922(a)(6) because he did not "knowingly" make a false statement to the firearms dealers (Pet. 7-8)—is without merit. The evidence showed that on September 13, 1983, petitioner pleaded nolo contendere to four felony counts in state court in Florida. While adjudication was withheld and petitioner was placed on one year's probation, petitioner was informed that, as a condition of his probation, he was prohibited from possessing any weapon or firearm. Shortly thereafter, on October 6, 1983, and again on November 29, 1983, petitioner purchased firearms while denying that he ever had been convicted of a crime punishable by imprisonment for a term exceeding one year. On this record, the jury was entitled to find that petitioner knowingly gave a false answer to the question posed on the federal firearms forms. Despite petitioner's contention to the contrary, the Eleventh Circuit's summary affirmance cannot be read as giving approval to a conviction under 18 U.S.C. 922(a)(6) where the defendant lacked criminal intent.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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